



**IMO**  
**INTERNATIONAL MARITIME LAW INSTITUTE**  
Established under the auspices of the International Maritime Organization  
A specialized agency of the United Nations



# **PREVENTION OF MIGRANT SMUGGLING BY LAND, SEA AND AIR ACT**

**A Legislation Drafting Project submitted in partial fulfillment of the requirements for the award of the Degree of Master of Laws (LL.M.) in International Maritime Law at the IMO International Maritime Law Institute**

**Submitted By: SIMON MANDUCA (MALTA)**

**Supervisor: MR RIYAZ HAMZA**

**Academic Year 2014-2015**

## **ACKNOWLEDGEMENTS**

My grateful thanks go to my supervisor Mr. Riyaz Hamza, B.A (Legal Policy), LL.B, LL.M (I.M.L.I), LL.M (Colombo), for his unwavering guidance and support while writing this Legislation Drafting Project. I would also like to thank all of the lecturers and staff at the International Maritime Law Institute Malta (I.M.L.I) for all of their assistance throughout the year.

# **TABLE OF CONTENTS**

Acknowledgements.....	2
Table of Contents.....	3
Introduction – Migrant Smuggling by Sea.....	4
The Migrant Smuggling Protocol.....	8
The Situation in Malta and the Mediterranean.....	18
Ratification and Incorporation in Malta.....	22
Explanation of the Draft Act.....	24
Draft Act.....	26

## Explanatory Note

### **Introduction – Migrant Smuggling by Sea**

Maritime migrant smuggling is considered to be a threat to maritime security and owing to the particular human element involved in this crime presents a grave problem to the international community.<sup>1</sup> Migrant smuggling, which usually occurs by sea, has become a prominent global issue, which also poses serious dangers for the migrants.<sup>2</sup> People desperately wishing to flee, legally or illegally, from war torn zones, poverty, natural disasters, racial and religious persecution and political instability in their countries in the hope of a better standard of living elsewhere,<sup>3</sup> seem prepared to take huge risks to achieve their aims. It is considered to be a maritime security threat due to the transportation of people in unseaworthy vessels, usually in atrocious conditions, exposed to life threatening risks, without adequate provisions, on long voyages which result in many fatalities every year. The deaths are caused by a number of scenarios, including drowning, suffocation, starvation, and even murder.<sup>4</sup>

The main response by Governments has been to tighten their border controls, leading to the migrants being forced to make use of criminal organizations to achieve their aims, due to the increased difficulty of gaining access to the destination countries.<sup>5</sup> Smuggling of migrants has therefore become a very lucrative business for the professional smugglers who are able to charge extortionist fees for their services.<sup>6</sup> The smuggling varies in complexity and ranges from relatively simple operations to sophisticated processes

---

<sup>1</sup> Mallia, Patricia; *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creating of a Co-operative Framework*, Martinus Nijhoff, Leiden, The Netherlands, 2010, p.3.

<sup>2</sup> Guilfoyle, Douglas; *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009, p.181.

<sup>3</sup> Kraska, James; Pedrozo Raul; *International Maritime Security Law*, 1st Edition, Martinus Nijhoff Publishers, Leiden, The Netherlands, 2013, p.657.

<sup>4</sup> *Ibid* p.659.

<sup>5</sup> Schloenhardt, Andreas and Dale, Jessica E; *Twelve years on: revisiting the UN Protocol against the Smuggling of Migrants by Land, Sea and Air* (2012) ZÖR 67, p.132.

<sup>6</sup> Kraska, James; Pedrozo Raul *op.cit.*, p.658.

including services such as the forging of passports and the use of elaborate travel arrangements to avoid detection.<sup>7</sup>

This crime necessitates a global approach to suppress this threat,<sup>8</sup> as nearly every State in the world is affected either as a country of origin, a country of transit or a final destination.<sup>9</sup> Also the potential for terrorists to make use of migrant smuggling networks cannot be ignored.<sup>10</sup> The international community has therefore sought to respond to this threat through various means including the use of a number of multilateral and bilateral initiatives.

The crime of migrant smuggling by sea is considered a complex area due to a number of inter-related considerations. The interdiction of vessels carrying migrants usually occurs either unilaterally or under treaties.<sup>11</sup> Due to the subject of the crime being people, as opposed to commodities as in other maritime crimes, this necessarily incorporates considerations of human rights, humanitarian law and refugee law into the fold. Also since unseaworthy vessels are usually used, obligations regarding the rescue of vessels in distress at sea and safety of life at sea must also be considered.<sup>12</sup>

The recognition of this crime as a type of organized crime led to the adoption of a Protocol to the United Nations Convention against Transnational Organized Crime<sup>13</sup> (CATOC) to address this threat. The Convention, which is the key international law treaty dealing with transnational organized crime, aims at the prevention, investigation and prosecution of offences in serious organized crime. It is supplemented by three Protocols dealing with people trafficking, migrant smuggling and the trafficking of

---

<sup>7</sup> Ibid.

<sup>8</sup> Mallia, Patricia; *op.cit.*, p.113.

<sup>9</sup> Schloenhardt, Andreas and. Dale, Jessica E; *op.cit.*, p.130.

<sup>10</sup> Mallia, Patricia; *op.cit.*, p.7

<sup>11</sup> Guilfoyle, Douglas; *op.cit.*, p.181.

<sup>12</sup> Mallia, Patricia; *op.cit.*, p.2.

<sup>13</sup> UN Doc. A/RES/55/25, United Nations Convention against Transnational Organized Crime, 15 November 2000. Entered into force 25 December 2003.

firearms.<sup>14</sup> To become a Party to any of the Protocols however, a State must first become a Party to the main Convention.<sup>15</sup>

The main instrument addressing the threat of migrant smuggling by sea is the Migrant Smuggling Protocol.<sup>16</sup> This is not an independent treaty but a Protocol to the CATOC. The origin of the Migrant Smuggling Protocol may be traced to the International Maritime Organization (IMO), which in 1997 noted, following a proposal made by Italy, that it was outside their scope to deal with the trafficking of migrants by sea, leading to the issue being developed as a Protocol under the umbrella of transnational organized crime.<sup>17</sup>

Several of the provisions of the Convention apply *mutatis mutandis* to the Protocols making them complementary.<sup>18</sup> All 172 State Parties agree to take various measures to combat transnational organized crime, ranging from criminalization of certain crimes in domestic law, to cooperation in enforcement, extradition and mutual legal assistance among others.<sup>19</sup>

The CATOC and the Migrant Smuggling Protocol therefore set out the necessary international cooperation for the suppression and criminalization of illegal transnational migrant smuggling.

A distinction must be drawn between the smuggling of migrants and the trafficking of persons. The main dissimilarity between the two is the element of consent. In migrant smuggling consent is typically given by the person being smuggled illegally into another State in exchange for a financial benefit,<sup>20</sup> while in the case of human trafficking no

---

<sup>14</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air (Migrant Smuggling Protocol); and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

<sup>15</sup> Kraska, James; Pedrozo Raul *op.cit.*, p.660.

<sup>16</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000. Entered into force 28 January 2004.

<sup>17</sup> Gallagher, Anne; 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly* 23 (2001) p.983.

<sup>18</sup> Schloenhardt, Andreas and Dale, Jessica E; *op.cit.*, p.138.

<sup>19</sup> Kraska, James; Pedrozo Raul *op.cit.*, p.660-661.

<sup>20</sup> Mallia, Patricia; *op.cit.*, p.10.

consent is usually given and the trafficking takes place either by deception, coercion or force with the aim of exploitation of the trafficked persons.<sup>21</sup>

Both crimes are defined separately in international law. The definitions are found in two different Protocols to the CATOC.

The Migrant Smuggling Protocol defines the smuggling of migrants in Article 3(a) as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’<sup>22</sup>

The more detailed definition of trafficking in persons is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>23</sup> in Article 3(a) which states that:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>24</sup>

---

<sup>21</sup>UNODC on human trafficking and migrant smuggling (UNDOC) <<http://www.unodc.org/unodc/en/human-trafficking/index.html?ref=menuaside>> accessed 31 December 2014

<sup>22</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 3(a)

<sup>23</sup> UN Doc.A/RES/55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000.

<sup>24</sup> Ibid Article 3(a).

As can be deduced from the above definitions the nature of the threat of human trafficking generally involves more human rights concerns due to the exploitation of the persons involved. Trafficking in persons has in fact been described as a modern form of slavery.<sup>25</sup> The end point of the crimes is also different in that the offence of smuggling usually ends on the arrival of the migrant at the country of destination, while in the case of trafficking in persons this is a continuing offence which will continue after reaching the country of destination.<sup>26</sup> It must also be noted that while the smuggling of migrants necessarily involves the crossing of borders, this need not be the case in human trafficking.<sup>27</sup>

The risks faced at sea in both of these crimes are the same, even though human trafficking may have a different goal to that of migrant smuggling.<sup>28</sup> It must however be noted that due to the high costs involved in the smuggling of migrants, willingly smuggled migrants may find themselves in a debt bondage which will render them effectively trafficked.<sup>29</sup> Actual offences will therefore often involve elements of both offences, making law enforcement and prosecution difficult.<sup>30</sup> Although the terms have overlapping elements, due to the continuing nature of the offence of trafficking in persons, enforcement action usually takes place after a border crossing and not in a maritime zone.<sup>31</sup>

## **The Migrant Smuggling Protocol**

The Migrant Smuggling Protocol<sup>32</sup> is intended to set up the appropriate legal basis in order to combat the crime of migrant smuggling by criminal groups,<sup>33</sup> while stressing the importance of safeguards and the human rights of the smuggled persons.<sup>34</sup> This can be

---

<sup>25</sup> United Nations Office on Drugs and Crime Issue Paper, 'Combating Transnational Organized Crime Committed at Sea' p.21.

<sup>26</sup> Mallia, Patricia; *op.cit.*, p.11.

<sup>27</sup> *Ibid.*

<sup>28</sup> Klein, Natalie; *Maritime Security and the Law of the Sea*, Oxford University Press, UK, 2011, p.313.

<sup>29</sup> Guilfoyle, Douglas; *op.cit.*, p.180.

<sup>30</sup> Mallia, Patricia; *op.cit.*, p.11.

<sup>31</sup> *Ibid* p.9.

<sup>32</sup> Malta ratified this Protocol on 24 September 2003.

<sup>33</sup> Kraska, James; Pedrozo, Raul *op.cit.*, p.662.

<sup>34</sup> Mallia, Patricia; *op.cit.*, p.112.



noted from the Preamble to the Protocol where the need to treat the migrants in a humane manner and with all their inherent rights is stressed.

This Protocol is not novel in structure, and generally follows the form found in other existing international jurisdictional frameworks. It provides a comprehensive structure, requiring the criminalization and punishment of particular acts and subjects State Parties to a range of obligations including extradition, cooperation, the giving of information and mutual legal assistance.

Mallia notes that the importance given to the rights and safeguards of the migrants themselves and the acknowledgment of the link of this crime to organized criminal activity, distinguish this Protocol from other legal instruments in maritime security law.<sup>35</sup> This is all neatly summarized in the statement of purpose of the Protocol found in Article 2 which states that ‘[t]he purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.’<sup>36</sup>

The definition of smuggling of migrants is provided in Article 3 as outlined above. This is the first codification of a definition of the term under international law.<sup>37</sup>

Interestingly in the *travaux préparatoires* Interpretive Notes, the terms ‘financial or other material benefit’ in the definition are deemed to include activities of organized criminal groups, but to exclude activities for humanitarian reasons or where support is provided based on family ties.<sup>38</sup>

The definition is however restricted by the scope of application provision, where Article 4 states that it shall only apply to:

---

<sup>35</sup> Ibid p.117.

<sup>36</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 2.

<sup>37</sup> Schloenhardt, Andreas and Dale, Jessica E; *op.cit.*, p.135.

<sup>38</sup> UN Doc A/55/383/Add.1 Para. 88.

..the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.<sup>39</sup>

This would therefore appear to exclude *ad hoc* or small-scale operations<sup>40</sup> which do not involve an organized criminal group or which are not transnational in nature. Due to the relationship between this Protocol and the main Convention the terms ‘transnational in nature’<sup>41</sup> and ‘organized criminal group’<sup>42</sup> are taken to have the definitions provided in the CATOC.

An innovative provision, in line with the main aim of the Protocol, is established in Article 5 which excludes criminal liability for the migrant purely for endeavoring to be smuggled. This is, however, not a general exclusion from liability for the migrants as they may still be held liable for other criminal offences under the domestic law of a State Party which they may have committed during their voyage.<sup>43</sup> This is explicitly stated in Article 6(4) which allows State Parties to take measures against any person who commits an offence against its domestic laws.

Article 6 provides a list of mandatory criminal offences which must be adopted into State Parties legislation. The *travaux preparatoires* Interpretive Notes indicate that with regard to this article the offences should be considered as being part of activities undertaken by organized criminal groups.<sup>44</sup> When committed intentionally and with the aim of obtaining

---

<sup>39</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 4.

<sup>40</sup> Kraska, James; Pedrozo, Raul *op.cit.*, p.663.

<sup>41</sup> An offence is ‘transnational in nature’ if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State.

<sup>42</sup> ‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

<sup>43</sup> Mallia, Patricia; *op.cit.*, p.118.

<sup>44</sup> UN Doc A/55/383/Add.1 Para. 92.

in any manner a financial or material benefit the following are to be considered as criminal offences:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants:
  - (i) Producing a fraudulent travel or identity document;
  - (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.<sup>45</sup>

The Protocol then also obliges State Parties to criminalize inchoate offences related to those in Article 6(1), such as the attempting to commit an offence,<sup>46</sup> participating as an accomplice,<sup>47</sup> or inciting others to commit an offence<sup>48</sup> listed, as well as establishing the necessary measures providing for aggravating circumstances to the crimes.<sup>49</sup> The Protocol importantly therefore obliges State Parties to set out a holistic framework of criminal offences related to migrant smuggling.

Part II of the Protocol specifically addresses the smuggling of migrants by sea. It provides for a legal mechanism to gain consent for boarding and requires States in Article 7 to ‘cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.’<sup>50</sup>

Although not stated in the Protocol, the *travaux préparatoires* Interpretive Notes indicate that none of the measures contemplated in Part II of the Protocol may be taken in the

---

<sup>45</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 6(1).

<sup>46</sup> Ibid Article 6(2)(a).

<sup>47</sup> Ibid Article 6(2)(b).

<sup>48</sup> Ibid Article 6(2)(c).

<sup>49</sup> Ibid Article 6(3).

<sup>50</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 7.

territorial sea of any State without express permission or authorization.<sup>51</sup> Flag State authorization is also required on the high seas.<sup>52</sup> Any action taken must aid in the prevention of migrant smuggling by sea and be based on the vessel actually endeavoring to commit the crime of smuggling of migrants. The Legislative Guide for the Implementation of the CATOC and its Protocols importantly notes that the establishment of jurisdiction over smuggling by sea is a prerequisite for the effective implementation of the section on migrant smuggling by sea.<sup>53</sup>

Article 8 sets out the regime for permissible boarding and inspection. Although this Protocol does not enter into the same level of detail as that found in the counterpart provisions in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>54</sup> Mallia notes that this is not to be considered a limitation due to the use of the words ‘*inter alia*’ in Article 8(2) indicating that the list is not exhaustive, and that other measures may be authorized.<sup>55</sup>

If a flag State has reasonable grounds to believe that a vessel flying its flag, claiming its registry without authorization or is without nationality and is engaged in the smuggling of migrants by sea, Article 8(1) allows the flag State to request the assistance of other State Parties in order to prevent the use of the vessel for migrant smuggling. State Parties are under an obligation to give such assistance as is possible within their means.<sup>56</sup>

Article 8(2) permits a State Party which has reasonable grounds to suspect that a vessel flying the flag of another State Party is engaged in migrant smuggling by sea, to request confirmation of registry, and upon confirmation request authorization to take appropriate measures necessary. These may ‘*inter alia*’ include authorization from the flag State to board and search the vessel, and if evidence of migrant smuggling by sea is found, to take any suitable actions necessary with respect to the vessel, the cargo and the people on

---

<sup>51</sup> Roach, J. Ashley ‘Initiatives to enhance maritime security at sea’, (2004) *Marine Policy* p.50.

<sup>52</sup> Mallia, Patricia; *op.cit.*, p.120.

<sup>53</sup> *Ibid* p.121.

<sup>54</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988 [Hereinafter 1988 Vienna Drugs Convention].

<sup>55</sup> Mallia, Patricia; *op.cit.*, p.124.

<sup>56</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 8(1).

board.<sup>57</sup> The term ‘engaged’ in this provision should be interpreted widely according to the *travaux préparatoires* Interpretive Notes<sup>58</sup> in order to cater for both direct and indirect use of vessels involved in migrant smuggling.<sup>59</sup> Any results from measures that are taken following this authorization must be promptly notified to the flag State.<sup>60</sup>

An unfortunate omission in the final Protocol is a definition section of what is permissible as was proposed in Article I of the 1997 Italian proposal for a Multilateral Convention to Combat Illegal Migration by Sea.<sup>61</sup> This provided for the following definitions of permissible enforcement jurisdiction:

- a. Verifying the vessels right to fly its flag; the vessel may be requested to give information on its nationality and the nationality of its crew, its port of departure and its destination;
- b. Stopping the vessel: the vessel may be ordered to stop or to change course and reduce speed appropriately, following the procedures mentioned in subparagraph a above, so that a team of inspectors may board the vessel to ascertain the truth of the information communicated and whether any migrants are on board.
- c. On board visit: when the vessel is stopped or has changed course as ordered and at the speed ordered, the aforementioned inspection team shall board the vessel to carry out the necessary verification of documents and inspections, in order to ascertain whether the vessel is involved in the trafficking of migrants;
- d. Diversion: if the vessel refuses to permit an on-board visit or if the on-board visit inspection reveals that irregularities are being committed, the vessel shall be ordered to go back to the port of departure or to divert to the nearest port of a contracting party, designated according to art L, and the state of which the migrants are nationals shall be informed of the outcome of the on-board visit. If

---

<sup>57</sup> Ibid Article 8(2).

<sup>58</sup> UN Doc A/55/383/Add.1 Para. 100.

<sup>59</sup> Schloenhardt, Andreas and Dale, Jessica E; *op.cit.*, p.143.

<sup>60</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 8(3).

<sup>61</sup> LEG 76/11/1 (1 August 1997).

the vessel fails to comply with such order, it shall be escorted to the prescribed destination.<sup>62</sup>

State Parties must respond to any request for a confirmation of registry, a determination if the vessel is entitled to fly its flag, or any authorization requested by another State Party expeditiously according to Article 8(4).<sup>63</sup>

The importance given to the human element in this threat is reflected in sub-article 5. This article retains the principle of exclusive flag State jurisdiction while endeavoring to facilitate cooperation between the requesting State and the flag State. It grants the flag State the right to subject any authorization given to conditions which must be mutually agreed, including conditions relating to responsibility and the extent of the authorization.<sup>64</sup> However the provision goes on to state that:

A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.<sup>65</sup>

The phrase ‘consistent with Article 7 of this Protocol,’ in Article 8(5) is specifically mentioned and Mallia opines that while in theory authorization for any action may be refused, any refusal that amounts to a lack of cooperation would contradict the obligation to cooperate in the suppression of migrant smuggling by sea found in Article 7.<sup>66</sup>

An appropriate competent authority to respond to any of the abovementioned request must also be established by the State Parties and this authority must be notified to all other State Parties within one month by the Secretary-General.<sup>67</sup>

---

<sup>62</sup> Article 1 of the 1997 Italian Proposal cited in Mallia, Patricia; *op.cit.*, p.115-116.

<sup>63</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 8(4).

<sup>64</sup> *Ibid* Article 8(5).

<sup>65</sup> *Ibid*.

<sup>66</sup> Mallia, Patricia; *op.cit.*, p.124.

<sup>67</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 8(6).

Article 8(7) allows any State Party that reasonably suspects that a ship without nationality or one assimilated to be without nationality, and engaged in migrant smuggling by sea, to be boarded and searched and to take all appropriate measures following confirmation of migrant smuggling.<sup>68</sup> This is in conformity with Articles 92(2) and 110 of UNCLOS.<sup>69</sup>

Specific safeguard provisions are found in Article 9 of the Protocol and require the boarding State to ensure the humane treatment and safety of persons aboard and that any measures taken are environmentally sound.<sup>70</sup> Article 9(1) states that when any of the measures are taken pursuant to Article 8, the State Party shall:

- (a) Ensure the safety and humane treatment of the persons on board;
- (b) Take due account of the need not to endanger the security of the vessel or its cargo;
- (c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;
- (d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.<sup>71</sup>

In the case of any loss or damage that occurs during any measure undertaken under Article 8, Article 9(2) provides that if this is proved to be unfounded, liability for compensation will be due, excluding however a scenario where the vessel has committed any act which may justify the actions of the other State Party.<sup>72</sup>

Article 9(3) goes on to ensure that any measure taken shall not interfere with or affect:

- (a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

---

<sup>68</sup> Ibid Article 8(7).

<sup>69</sup> Kraska, James; Pedrozo, Raul *op.cit.*, p.665.

<sup>70</sup> Guilfoyle, Douglas; *op.cit.*, p.185.

<sup>71</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 9(1).

<sup>72</sup> Ibid Article 9(2).

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.<sup>73</sup>

In this way the boarding procedure remains in conformity with the international law of the sea and preserves the general principle of the primacy of flag State authority.

As with all other boarding regimes, the boarding and any other measures taken pursuant to Article 8 are limited to warships or military aircraft, or other ships or aircraft that are authorized and clearly marked as being on Government service.<sup>74</sup>

Part III of the Migrant Smuggling Protocol deals with the issues of prevention, cooperation and other measures. It implements several necessary support provisions including provisions related to information,<sup>75</sup> border measures,<sup>76</sup> security and control of documents,<sup>77</sup> legitimacy and validity of documents,<sup>78</sup> training and technical cooperation,<sup>79</sup> as well as considering the conclusion of bilateral and regional arrangements to combat migrant smuggling by sea,<sup>80</sup> among others.

Article 15 importantly obliges State Parties to take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 is a criminal offence.<sup>81</sup>

Two innovative articles are found in this section which are specific to this threat. These are Article 16 dealing with the protection of migrants, and Article 18 dealing with the return of migrants.

---

<sup>73</sup> Ibid Article 9(3).

<sup>74</sup> Ibid Article 9(4).

<sup>75</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 10.

<sup>76</sup> Ibid Article 11.

<sup>77</sup> Ibid Article 12.

<sup>78</sup> Ibid Article 13.

<sup>79</sup> Ibid Article 14.

<sup>80</sup> Ibid Article 17.

<sup>81</sup> Ibid Article 15.



State Parties are obliged by Article 16 to take all required measures to preserve and protect the rights of the persons mentioned in Article 6, with particular emphasis on their ‘right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.’<sup>82</sup> It must also be noted that although human rights obligations do arise, the migrants may also enjoy further protection under Refugee Law.<sup>83</sup>

Article 18 refers to an agreement to ‘facilitate and accept, without undue or reasonable delay’<sup>84</sup> the return of migrants to their State of origin, of which they are either nationals or permanent residents, when the migrants have been interdicted in a transit or destination State.<sup>85</sup>

Once a request for a return is made, the apparent State of origin must verify if the migrant is actually its national without delay.<sup>86</sup> In the case where the migrant is found to be a national of a State Party, and is without proper documentation, the Protocol obliges the State of origin to issue such documents as may be necessary in order to facilitate the return.<sup>87</sup> An obligation is also placed on all State Parties to ensure the safety and dignity of the migrants and to proceed with the return in a systematic manner.<sup>88</sup>

Article 18(8) also specifies that this Article will not affect any other bilateral or multilateral arrangements which may be in place regarding the return of migrants.<sup>89</sup> The main difficulty with this provision is that migrants often do not have any proper documentation thus making identification and return particularly problematic.<sup>90</sup>

---

<sup>82</sup> Ibid Article 16(1).

<sup>83</sup> Mallia, Patricia; *op.cit.*, p.14.

<sup>84</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 18(1).

<sup>85</sup> Kraska, James; Pedrozo, Raul *op.cit.*, p.666.

<sup>86</sup> UN Doc.A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, Palermo, 15 November 2000, Article 18(3).

<sup>87</sup> Ibid Article 18(4).

<sup>88</sup> Ibid Article 18(5).

<sup>89</sup> Ibid Article 18(8).

<sup>90</sup> Malta has indeed concluded such agreements in line with this Article, such as a bilateral agreement with Nigeria providing for the repatriation of irregular migrants. The agreement, in line with the aims of the Protocol, ensures the safeguarding of their human rights and preventing any maltreatment on return. ‘Important agreement signed between Malta and Nigeria for the repatriation of irregular immigrants’ (Ministry for Foreign Affairs, 4 April 2014) <<http://www.mfa.gov.mt/Default.aspx?MDIS=21&NWID=4866>> accessed 3 January 2015.

The final provisions of the Protocol deal with certain administrative matters such as a Saving Clause in Article 19, a Settlement of Disputes clause in Article 20, Signature, Ratification, Acceptance, Approval and Accession in Article 21, Entry into Force of the Protocol in Article 22, an Amendment Clause in Article 23 and Denunciation and Depository and language clauses in Articles 24 and 25 respectively.

## **The Situation in Malta and the Mediterranean**

Migrant Smuggling by sea is of direct and immediate relevance to Malta. The Mediterranean has been a popular route for entry into Europe. According to the 2013 Report from the Migration Policy Centre, Florence, between 1998 and 2013 623,118 illegal migrants reached European Union shores, with 39,420 migrants in 2013 alone.<sup>91</sup> This data however is only indicative of the scale of the problem as it only takes into account actual apprehensions,<sup>92</sup> and much of the data available may be inaccurate due to the underreporting of incidents.<sup>93</sup>

Southern Europe, especially Italy, Spain and Malta are attractive transit or final destination points. All three States have requested EU assistance to deal with illegal migration, which has led to these States entering into repatriation agreements with some of the States of departure as well as maritime patrol which are intended to deter the illegal migrant vessels.<sup>94</sup> Although Malta is not usually an intended point of destination, many illegal migrants happen upon the island due to its location. It is situated along the migration route from Africa to Europe, being North of Libya and only 93km south of Sicily.<sup>95</sup>

---

<sup>91</sup> De Bruycker, Philippe Di Bartolomeo, Anna and Fargues, Philippe 'Migrants smuggled by sea to the EU: facts, laws and policy options', European University Institute, Florence, Robert Schuman Centre for Advanced Studies Migration Policy Centre Report 2013/09, p.3.

<sup>92</sup> Mallia, Patricia; *op.cit.*, p.8.

<sup>93</sup> Migrant Smuggling (UNDOC) <<http://www.unodc.org/unodc/en/human-trafficking/smuggling-of-migrants.html?ref=menuaside>> accessed 31 December 2014.

<sup>94</sup> Guilfoyle, Douglas; *op.cit.*, p.209.

<sup>95</sup> Mallia, Patricia; *op.cit.*, p.13.

In the European Union, although prioritizing the issue of illegal immigration, a notable issue which is particularly affecting Malta due to its small size, comes from the principle set out in the 2003 Dublin Regulation, whereby asylum seekers are to lodge their claim for asylum in the country of first arrival, and where it is shown that the individual has passed through another Member State first, he may be returned there for processing. This necessarily places a disproportionate burden on the southern EU States, such as Italy and Malta, while the rest of the Union is not as affected.<sup>96</sup>

This is particularly problematic as ‘there is no doubt at all that recent trends observed in landings in both Malta and in Italy indicate that organized criminals are helping illegal immigrants to leave the North African shores and then abandoning them in Malta’s or Italy’s search and rescue areas for European coast guards to retrieve.’<sup>97</sup>

This has in fact led to a shift toward maritime patrols, intended to serve as both a deterrent and also to have humanitarian objectives. This area of the law is considered complex due to the number of inter-related obligations that arise, however as noted by Mallia the main issues remain the same: ‘interception, disembarkation, how to deal with the rescue operations and claims for asylum, and how to prevent irregular entry through smuggling operations via the maritime borders.’<sup>98</sup>

Another issue arises with the obligations in the Search and Rescue Convention (SAR Convention) to provide a place of safety as this does not mean that the State responsible for the SAR region is automatically obliged to allow the rescued migrants into its own territory.<sup>99</sup>

This has in fact led to a number of incidents such as the 2009 *Pinar* incident where following the rescue of 153 migrants off Lampedusa, the vessel was refused entry into Italian territorial waters on the ground that the Migrants were rescued in Malta’s SAR

---

<sup>96</sup> Ibid p.12.

<sup>97</sup> Opening Address at the Libya-European Union Seminar on “Saving Life at Sea and in the Desert”, Press Release (20 July 2005) cited in Mallia, Patricia; *op.cit.*, p.13.

<sup>98</sup> Mallia, Patricia; *op.cit.*, p.164.

<sup>99</sup> United Nations Office on Drugs and Crime Issue Paper, ‘Combating Transnational Organized Crime Committed at Sea’ 22-23.

zone.<sup>100</sup> Similarly in the 2013 *M/V Salamis* incident, the Turkish tanker, on route from Libya to Syracuse, who rescued 102 migrants was denied entry into Malta's territorial waters, Malta claiming that the tanker should have returned to Libya as this was the closest safe port. After two days of being anchored at sea outside Maltese territorial waters, the migrants were accepted by Italy on humanitarian grounds.<sup>101</sup>

In 2006, Malta refused the Spanish vessel the *Francisco Catania* permission to disembark 52 persons rescued in the Mediterranean, contending that they were Libya's responsibility as they were picked up in the Libyan SAR zone. In this instance Guilfoyle notes that Malta was clearly not under a duty to allow the rescued migrants to disembark and did not violate their safety of life at sea obligations by insisting that the vessel sail on.<sup>102</sup>

Similar practices have occurred in both the United States and Australia where these States have considered returning illegal migrants back to the high seas as permissible under international law. Guilfoyle argues that this practice, with regard to refugee law gives rise to three possibilities:

First, this might constitute practice subsequent to a treaty capable of establishing the agreement of the parties regarding its interpretation. Second, it could evidence state practice on the part of specially affected states supporting a rule of *lex specialis* modifying the application at sea of the *lex generalis* of refugee law, assuming that a subsequent rule of customary law may modify a prior rule of treaty law. Or third, it could simply be regarded as conduct breaching an international obligation in any case where individual refugees are subjected to refoulment as a result.<sup>103</sup>

---

<sup>100</sup> Ibid p.23.

<sup>101</sup> 'MEP urges EC to take action against Malta over Salamis incident' (Malta Independent, 1 September 2013) <<http://www.independent.com.mt/articles/2013-09-01/news/mep-urges-ec-to-take-action-against-malta-over-salamis-incident-2472181763/>> accessed 31 December 2014.

<sup>102</sup> Guilfoyle, Douglas; *op.cit.*, p.221.

<sup>103</sup> Ibid p.224.

Due to the growing perception that points of entry States cannot cope with the number of migrants arriving, preventative maritime patrols seem to be a legally permissible response. The European practice is beginning to follow the trend set in both the United States and Australia, of turning seaworthy vessels back to their point of departure.<sup>104</sup> Guilfoyle interestingly argues that:

Such interdiction practice, coupled with other parties acquiescence, establishes the agreement of the parties that such acts are compatible with the [Refugee] Convention. It is certainly possible that the treaty revision may be brought about by practice or conduct, rather than effected by and recorded in writing. If there is a strong trend in the practice of the only relevantly affected states, generally unopposed by other state parties, it makes a case that such an exception – however undesirable on humanitarian grounds – may become, or already be, established in international law.<sup>105</sup>

The necessity of having in force a coherent legal framework in Malta to deal with these issues is therefore of utmost importance.

Malta has already ratified the CATOC and the Protocol against Migrant Smuggling on 24 September 2003, but has however not incorporated either into domestic law in Malta. Migrant Smuggling in Malta, to date, is dealt with solely under the Refugees Act, Chapter 420, Laws of Malta. Due to this, the additional protection granted to the migrants and the comprehensive structure provided in the Protocol for the prevention of migrant smuggling, is absent from domestic law. For this reason the Prevention of Migrant Smuggling by Land, Sea and Air Act is proposed.

Due to the ongoing threat posed by the increasingly dangerous situation in North Africa in 2014-2015, leading to huge numbers of migrants wishing to flee, particularly on the route from Libya to Italy, it is contended that although the CATOC has not been incorporated into national law since it primarily deals with the prevention, investigation

---

<sup>104</sup> Ibid p.226.

<sup>105</sup> Ibid.

and prosecution of serious transnational organized crimes such as money laundering, corruption and obstructing of justice, it however leaves all matters relating to the smuggling of migrants to the Protocol.

Due to the imminent, real and grave threat currently being faced by Malta and the southern EU States, including enormous tragedies such as that which occurred on 19 April 2015 where hundreds of migrants drowned when a boat carrying over 700 people capsized,<sup>106</sup> it is submitted that the Migrant Smuggling Protocol, a largely comprehensive piece of legislation directly addressing this threat should indeed be incorporated without delay. Although not an independent convention in itself, the proposed draft Act will incorporate the necessary provisions of the main Convention to allow it to remain in line with the international instruments.

The adoption of this draft Act on the smuggling of migrants is therefore being proposed due to the very serious and alarming current situation in the Mediterranean which calls for urgent attention.

The incorporation into domestic law of the Migrant Smuggling Protocol would be an important step in order to attempt to address this threat effectively but also to safeguarding the fundamental rights of the migrants.

## **Ratification and Incorporation in Malta**

The main legal instrument in the Maltese legal system dealing with the ratification of treaties is the Ratification of Treaties Act, Chapter 304 of the Laws of Malta. The Act establishes in Article 3(1) that where a treaty to which Malta becomes a party after the coming into force of this Act is one which affects or concerns:

---

<sup>106</sup><<http://www.bbc.com/news/world-europe-32371348>> accessed 25/04/2015.

- (a) the status of Malta under international law or the maintenance or support of such status, or
- (b) the security of Malta, its sovereignty, independence, unity or territorial integrity, or
- (c) the relationship of Malta with any multinational organization, agency, association or similar body,

Such treaty shall not enter into force with respect to Malta unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of this Act.<sup>107</sup>

Article 3(2) then goes on to say that where a treaty to which Article 3(1) applies shall be ratified or have its ratification authorised or approved as follows:

- (a) where such treaty concerns a matter referred to in sub-article (1) (a) or (b) or contains any provision which is to become, or to be enforceable as, part of the law of Malta, by Act of Parliament;
- (b) in any other case, by Resolution of the House of Representatives.

Article 3 goes on to state that no provision of a treaty shall become, or be enforceable as, part of the law of Malta except by or under an Act of Parliament. The instrument of ratification shall be issued under the signature of the Minister responsible for Foreign Affairs and any act of a foreign State relating to any of the matters mentioned in (a) or (b) shall be laid on the Table of the House as soon as practicable by the Minister responsible, together with a motion giving an opportunity to the House to express itself on such act.

Therefore, as can be seen from the above, this necessitates the incorporation of an International Convention or Treaty into domestic law by means of a separate Act. It is

---

<sup>107</sup> Ratification of Treaties Act Malta, Chapter 304 of the Laws of Malta Article 3(1).

only following this incorporation into domestic law that all subjects and the Courts will be bound.

## **Explanation of the Draft Act**

The Draft Act is based on a combination of the Migrant Smuggling Protocol, the Model Law against the Smuggling of Migrants published by UNDOC, the CATOC and General principles of international law. The Draft Act is split into five parts and consists of 34 Articles. It begins with defining the scope of application and the definitions of terms used, both from the Migrant Smuggling Protocol as well as the CATOC. It then goes on to deal with issues of jurisdiction. Following this the crimes are listed including the aggravating circumstances. The draft incorporates articles aimed at the protection and assistance to migrants, including a provision for civil proceedings in the case of breach of rights. The draft provides for provisions for the appointment of a Commissioner for migration, authorized officers, a coordination committee and a national agency with various powers and obligations granted to each. The Draft sets out the boarding procedures and the rights and obligations and importantly the relevant safeguards. The draft also details the process for the return of migrants. It also provides for provisions on training and prevention, information as well as other preventive measures.

This Act is novel as it seeks to harmonize the Migrant Smuggling Protocol with its parent Convention, The CATOC, as well as remain in line with other principles of international law, including human rights law, humanitarian law and international law of the sea. The human element involved in this crime necessitates an approach by which a high level of protection is granted to the migrants and their fundamental rights, while ensuring that the true perpetrators of the crimes, the smugglers, are caught and punished appropriately.

As stated, the vast majority of Articles in this Draft Act are based on the provisions found in the Migrant Smuggling Protocol. However various Articles have also been based on other international law instruments, as well as local legislation.

Several of the definitions are taken from other instruments such as the definition of ‘child’ which is taken from the Convention on the Rights of the Child Article 1. ‘Non-



refoulement’ is taken from Article 33 of the Convention relating to the Status of Refugees and that of ‘serious crime’ is taken from the CATOC.

Several of the provisions incorporating national structures are based on local legislation, such as the incorporating of a Commissioner for Migration found in Article 6 of the Draft Act and Civil Proceedings in Article 19.

The jurisdiction provisions and statement of purpose are based on those found in the CATOC, therefore amalgamating the required provisions of the main Convention into a Draft Act incorporating the Protocol.

The provision on access to consular officials in Article 18 of the Draft Act was based on the Vienna Convention on Consular Relations.

Other provisions were based on the Model Law against the Smuggling of Migrants including the Ancillary provisions in Article 13 and the provision on Authorized Officers in Article 21.

The Safeguard provisions found in Article 24 were based both on the provisions on the Migrant Smuggling Protocol as well as the United Nations Convention on the Law of the Sea.

The majority of the remaining Articles were then based directly on the corresponding provision of the Migrant Smuggling Protocol adapted into the Draft Act.

Merging several related international instruments in this way attempts to produce a more comprehensive and coherent draft Act on the Smuggling of Migrant which remains in line with other international law instruments.

## **Draft Act**

### **Part I**

#### **Article 1 - Title**

The short title of this Act is the Prevention of Migrant Smuggling Act.

#### **Article 2 - Definitions**

In this Act, unless the context otherwise requires –

“Child” shall mean a person under the age of 18 years;

“Commercial carrier” shall mean a legal or natural person who engages in the transportation of goods or people for commercial gain;

“Financial or other material benefit” shall include any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services);

“Fraudulent travel or identity document” shall mean any travel or identity document:

- (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State;
- (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (iii) That is being used by a person other than the rightful holder;

“Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

“Non-refoulement” refers to the principle of international law which prohibits the return by a State, in any manner whatsoever, of an individual to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality,

membership of a particular social group or political opinion, or would run the risk of torture, inhuman and degrading treatment or other forms of irreparable harm. Refoulement includes any action having the effect of returning the individual to a State, including expulsion, deportation, extradition, rejection at the frontier (border), extraterritorial interception and physical return;

“Serious crime” shall mean an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

“Smuggled migrant” shall mean any person who has been the object of conduct criminalized under this Act, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted;

“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

“Protocol” means UN Doc. A/RES/55/25, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

“Protocol State” shall mean any State Party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

“Vessel” shall mean any type of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service;

### **Article 3 – Incorporation**

This Act incorporates the obligations assumed by Malta under the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.

### **Article 4 – Statement of Purpose**

The purposes of this Act are:

- (a) To prevent and combat the smuggling of migrants;
- (b) To promote and facilitate national and international cooperation in order to meet these objectives;
- (c) To protect the rights of smuggled migrants; and
- (d) To cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

### **Article 5 - Interpretation**

This Act shall be interpreted and applied in a way:

- (a) That is not discriminatory on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
- (b) That is consistent with the principle of non-refoulement;
- (c) That is consistent with other obligations arising from Malta's obligations under international law;
- (d) That takes into account the special needs of smuggled migrants who are women and children or who otherwise have special needs.

## **Part II**

### **Article 6 - Commissioner for Migration**

- (1) There shall be a person who shall be known as the Commissioner for Migration.
- (2) The Commissioner shall be appointed by the Prime Minister from among public officers or from among persons who in each case, in the opinion of the Prime Minister, have knowledge and experience in matters relating to migrants.
- (3) The Commissioner shall perform such functions as are conferred on him by this Act.
- (4) The Prime Minister may assign public officers to be members of the staff of the Commissioner as he may consider necessary to assist the Commissioner in the performance of his functions.
- (5) Without prejudice to international commitments in relation to the free movement of people, the Commissioner shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

### **Article 7 – Coordinating Committee**

- (1) The Commissioner shall establish a national coordinating committee.
- (2) The national coordinating committee shall:
  - (a) Oversee and coordinate the implementation of this Act;
  - (b) Develop policies, guidelines, procedures and other measures to facilitate the implementation of this Act;
  - (c) Develop a national plan of action to ensure comprehensive and effective implementation of this Act, which shall include a process of periodic review of achievement of aims and objectives;
  - (d) Oversee and report to Parliament on the implementation of obligations under the Migrant Smuggling Protocol;
  - (f) Facilitate cooperation with relevant countries of origin, transit and destination, in particular border control agencies.

### **Part III**

#### **Article 8 - Jurisdiction**

(1) This Act shall apply to any offence established under this Act when:

- (a) The offence is committed, wholly or partly, within the territory of Malta; or
- (b) The offence is committed, wholly or partly, on board a vessel that is flying the flag of Malta or an aircraft that is registered under the laws of Malta at the time the offence was committed; or
- (c) The offence is committed by a person present in Malta whose extradition is refused on any ground;
- (d) The offence is committed by a Maltese national, permanent resident, or habitual resident;
- (e) The offence is committed outside the territory of Malta with a view to the commission of a serious crime within the territory of Malta.

#### **Article 9 – Extended Jurisdiction**

In addition to the jurisdiction provided for in Article 8, jurisdiction is granted regarding conduct engaged outside Malta on a vessel reasonably suspected of being engaged, directly or indirectly, in the smuggling of migrants by sea:

- (a) If the vessel is without nationality or may be assimilated to a vessel without nationality;
- (b) If the vessel, although flying a foreign flag or refusing to show a flag, is in reality of Maltese nationality; or
- (c) If the vessel is flying the flag or displaying the marks of registry of a Protocol State other than Malta.

## **Article 10 – Criminal Liability of Smuggled Migrants**

Without prejudice to the applicability of other laws establishing criminal offences under national law, migrants shall not become liable to criminal prosecution under this Act for the fact of having been the object of conduct set forth in the following provision.

## **Article 11 – Criminalization**

- (1) Any person who intentionally, in order to obtain directly or indirectly a financial or other material benefit, undertakes the smuggling of migrants and procures the illegal entry of a person into Malta where the person is not a national or a permanent resident, commits an offence punishable by four to ten years imprisonment.
- (2) When committed for the purpose of enabling the smuggling of migrants the following shall be considered an offence punishable with not less than four years imprisonment:
  - (i) Producing a fraudulent travel or identity document,
  - (ii) Procuring, providing or possessing such a document.
- (3) Any person who intentionally, in order to obtain directly or indirectly a financial or material benefit, uses illegal means to enable a person who is not a national or a permanent resident to remain in Malta without complying with the necessary requirements for legally remaining in Malta, commits an offence punishable by two years imprisonment.
- (4) Any person who attempts to commit any offence under this Act shall be subject to the same punishment decreased by one degree.
- (5) Any person who participates as an accomplice to an offence under this Act is subject to the same punishment decreased by one degree.
- (6) Any person who organizes or directs another person or persons to commit an offence under this Act is subject to the same penalty as the offence.

## **Article 12 – Aggravating Circumstances**

If any of the following circumstances are present, the offences under this Act shall be punishable by the penalty increased by one degree:

- (a) The offence involved circumstances that endangered or were likely to endanger the life or safety of the smuggled migrant;
- (b) The offence involved circumstances that entailed inhuman or degrading treatment, including the exploitation of the smuggled migrants;
- (c) The offence involved a large number of smuggled migrants;
- (d) The offender confiscated, destroyed or attempted to destroy the travel or identity documents of the smuggled migrant;
- (e) The offender intentionally takes advantage of/abuses the apparent or known vulnerability or dependency of a smuggled migrant, including vulnerability or dependency that arises from having entered or being in the State illegally or without proper documentation, pregnancy, physical or mental disease, disability or reduced capacity to form judgements by virtue of being a child, for profit or other material benefit.

### **Article 13 – Ancillary provision**

Where any person has been found guilty of an offence under this Act, a Court may, in addition to any penalty imposed under this Act and without limiting any other powers of the Court, order the following measures:

- (a) Confiscation of assets, proceeds of crime and instruments of the crime;
- (b) Payment of restitution or compensation to victims of the crime;
- (c) Temporary or permanent closure of any establishment or enterprise that was used to commit the offence in question;
- (d) Temporary or permanent disqualification from participation in public procurement;
- (e) Temporary or permanent disqualification from practice of other commercial activities and/or from creation of another legal person; and
- (f) Any other non-custodial measures as appropriate.



#### **Article 14 – Bilateral or Regional Agreements**

Bilateral or regional agreements may be entered into which are aimed at establishing the most appropriate and effective measures to prevent and combat the conduct set forth in this Act.

#### **Article 15 – Duty of and offence by Commercial Carriers**

(1) Any commercial carrier that fails to verify that every passenger possesses the identity and/or travel documents required to enter Malta and any transit State, commits an offence and is liable to a fine of one thousand (1,000) Euros per passenger.

(2) Any commercial carrier that fails to notify the competent authorities that a person has attempted to or has travelled on that carrier without the identity and travel documents required to enter Malta or any transit State with knowledge or in reckless disregard of the fact that the person was a smuggled migrant, commits an offence and is liable to a fine of one thousand (1,000) Euros.

(3) A commercial carrier is not liable under this article when the persons it transported were provided protection against refoulement and/or access to the asylum system by the competent authorities.

#### **Article 16 – Facilitating entry or stay for justice purposes**

The Commissioner may grant a temporary residence permit to a smuggled migrant in order to facilitate the investigation and/or prosecution of an offence under this Act.

#### **Article 17 – Protection and assistance**

(1) (a) Smuggled migrants shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of Malta.

(b) Such emergency medical care shall not be refused to them by reason of any irregularity with regard to their entry or stay in Malta.

(2) Smuggled migrants shall be afforded appropriate protection against violence that may be inflicted upon them, especially taking into account the special needs of women and children.

(3) Appropriate assistance shall be given to migrants whose lives or safety is endangered by reason of being smuggled. These measures shall take into account the special needs of women and children.

#### **Article 18 – Access to consular officials**

(1) Where a smuggled migrant has been arrested, detained or is in custody, the arresting or detaining authority is required to inform the smuggled migrant without delay about his or her right to communicate with consular officers, and all reasonable steps are to be taken to facilitate such communication.

(2) If the smuggled migrant requires contact with consular officers, the detaining authority is required to notify the relevant consul that a national of that State has been arrested or detained, provide the location where the smuggled migrant is being held and facilitate contact.

(3) Smuggled migrants who are being held in custody or detention shall have the following rights:

(a) To receive visits from consular officers;

(b) To converse and correspond with consular officers; and

(c) To receive communications sent by consular authorities without delay.

(4) The arresting or detaining authority shall take all reasonable steps to facilitate such visits and communication.

(5) The arresting or detaining authority shall forward all correspondence from the smuggled migrant that is addressed to the relevant consular office without delay.

## **Article 19 – Civil proceedings**

(1) A smuggled migrant who has been subjected to violence, torture or other cruel, inhuman or degrading treatment or punishment, or threats to his or her life or safety as a result of being the object of conduct criminalized by this Act shall have the right to institute civil judicial proceedings to claim material and non-material damage suffered as a result of the acts specified.

(2) The right to pursue a civil judicial proceeding for material or non-material damages shall not be affected by the existence of criminal proceedings in connection with the same acts from which the civil claim derives.

## **Part IV**

## **Article 20 – Designated National Authority**

(1) For the purpose of facilitating cooperation between Malta and other Protocol States to prevent and suppress the smuggling of migrants by sea, the Commissioner shall designate in writing an authority or authorities:

- (a) To receive and respond to requests for assistance from Protocol States;
- (b) To transmit requests for assistance to Protocol States;
- (c) To receive and respond to requests for confirmation of registry or of the right of a vessel to fly the flag of Malta;
- (d) To receive and respond to requests for authorization from Protocol States to take appropriate measures necessary; and
- (e) To transmit requests for authorization to Protocol States to take appropriate measures.

(2) The competent national authority or authorities shall respond expeditiously to any request made under paragraph 1.

## **Article 21 – Authorized Officers**

(1) The Commissioner may in writing designate any police officer or customs officer to be an authorized officer for purposes relating to the exercise of powers under this section.

(2) The following powers are granted to authorized officers:

(a) Powers to verifying the vessels right to fly its flag; the vessel may be requested to give information on its nationality and the nationality of its crew, its port of departure and its destination;

(b) Powers to stop the vessel: the vessel may be ordered to stop or to change course and reduce speed appropriately, following the procedures mentioned in subparagraph (a) above, so that a team of inspectors may board the vessel to ascertain the truth of the information communicated and whether any migrants are on board;

(c) Powers to board: when the vessel is stopped or has changed course as ordered and at the speed ordered, the aforementioned inspection team shall board the vessel to carry out the necessary verification of documents and inspections, in order to ascertain whether the vessel is involved in the smuggling of migrants;

(d) Powers of diversion: if the vessel refuses to permit an on-board visit or if the on-board visit inspection reveals that irregularities are being committed, the vessel shall be ordered to go back to the port of departure or to divert to the nearest port of a Protocol State, and if the vessel fails to comply with such order, it shall be escorted to the prescribed destination;

(e) Powers to question persons on board the vessel;

(f) Powers to refer persons on board the vessel to the appropriate authorities, including law enforcement authorities, also including the agencies responsible for making assessments of claims for international protection;

(g) and another other power the Commissioner may deem necessary for the function of the Officers.

**Article 22 - Conditions and limitations on the exercise of special enforcement powers by authorized officers**

(1) Any powers conferred on authorized officers as a result of this Act shall be exercisable in relation to any vessel for the purposes of detecting and taking appropriate action in respect of the smuggling of migrants by sea.

(2) Those powers shall not be exercised in relation to a vessel beyond the limits of the territorial sea of Malta and flying the flag or displaying the marks of registry of another Protocol State except if:

(a) Malta is exercising its right of control in its contiguous zone or the right of hot pursuit; or

(b) The Commissioner has given authority.

(3) The Commissioner shall not give the authority contained in paragraph 2 (b) above unless satisfied that:

(a) The Protocol State has requested assistance from Malta for the purposes of detecting or preventing the smuggling of migrants and taking appropriate action; or

(b) The Protocol State has authorized Malta to act for that purpose.

(4) The Commissioner shall impose such conditions or limitations on the exercise of the powers as may be necessary to give effect to any conditions or limitations imposed by the Protocol State.

(5) The Commissioner may, either on his or her own initiative or in response to a request from a Protocol State, authorize a Protocol State to exercise, in relation to a Maltese flagged vessel, powers corresponding to those conferred on officers authorized under this Act but subject to such conditions or limitations, if any, as he or she may impose.

(6) The powers conferred on officers authorized under this Act shall not be exercised in the territorial sea of any other State without the authority of the Commissioner who shall not give such authority unless that State has consented to the exercise of those powers.

## **Article 23 - Boarding Provisions**

(1) If reasonable grounds exist to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another Protocol State is engaged in the smuggling of migrants by sea may so notify the flag State authorities, request confirmation of registry and, if confirmed, request authorization from the flag State authorities to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

(2) If any measures are taken in accordance with Paragraph (1) of this article, the flag State shall be informed promptly of any results.

(3) If reasonable grounds exist to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, appropriate measures in accordance with relevant domestic and international law shall be taken.

## **Article 24 - Safeguards**

(1) Any measure taken at sea pursuant to this Act shall be carried out only by warships or military aircraft, or by other ships or aircraft including customs, coastguard and police vessels, clearly marked and identifiable as being on government service and authorized to that effect.

(2) When taking measures against a vessel in accordance with this Act, an authorized officer is required to take all necessary steps:

- (a) To afford migrants protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct criminalized by this Act;
  - (b) To assist migrants whose lives or safety are endangered by reason of being the object of conduct criminalized by this Act;
  - (c) To take into account the special needs of women and children;
  - (d) To ensure the safety and humane treatment of the persons on board;
  - (e) To ensure that any measures taken are compliant with human rights and humanitarian obligations, the right to seek asylum and international protection, and the obligation of non-refoulement;
  - (f) To take due account of the need not to endanger the security of the vessel or its cargo;
  - (g) To take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State; and
  - (h) To ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.
- (3) Nothing in this Act shall affect the obligations of any person to render assistance to those in distress at sea.

#### **Article 25 - Compensation for loss**

The holder of legal rights in the vessel is entitled to reasonable compensation for loss or damage sustained as a result of actions taken, or purportedly taken, by an officer authorized under this Act when the grounds for measures taken prove to be unfounded, except if the vessel, or any person on the vessel, has committed any act that would justify the measures taken.

#### **Article 26 – Protection of Migrants**

(1) In performing its functions under this Act, the Coordinating Committee shall ensure that smuggled migrants who are seeking international protection under national asylum laws, the Convention relating to the Status of Refugees or international law, or who have

particular protection needs are quickly referred to the competent authorities to decide on their case.

(2) The Coordinating Committee shall ensure that the Office of the United Nations High Commissioner for Refugees is given access to smuggled migrants who are asylum-seekers and other persons of concern to the Office.

### **Article 27 – Return of Migrants**

(1) The return of migrants is to be carried out in an orderly manner and with due regard for the safety and dignity of the person.

(2) The Coordinating Committee may coordinate with the relevant international organizations for the implementation of the return of migrants.

(3) The Coordinating Committee shall ensure that any return of a smuggled migrant is consistent with international law, in particular human rights, refugee and humanitarian law, including the principle of non-refoulement, the principle of non-discrimination, the right to life, the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment, and, where children are involved, the best interests of the child.

(4) Every effort should be made to limit the use of force in the return process. The only forms of restraint which are acceptable are those constituting responses that are strictly proportional to the actual or reasonably anticipated resistance of the particular returnee with a view to controlling him or her.

### **Article 28 – Information policies and procedure**

(1) The Coordinating Committee shall develop policies and procedures to ensure that any exchange of information about a smuggled migrant with a State of return will not put the returnee, or his or her relatives, in danger upon return.

(2) Information about the existence or content of any application made by the smuggled migrant for international protection shall not be provided to a State of return.



### **Article 29 – Legitimacy of documents**

The Coordinating Committee shall, at the request of the appropriate authority or representative of another Protocol State, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in the name of Malta and suspected of being used for the purposes of smuggling of migrants.

### **Article 30 – Facilitating the return of migrants**

The Coordinating Committee shall:

(a) At the request of the appropriate authority or representative of another Protocol State, of the smuggled migrant or of its own initiative, facilitate without undue or unreasonable delay, the return to Malta of a smuggled migrant who is a national of Malta or has the right of permanent residence in Malta at the time of return;

(b) At the request of the appropriate authority or representative of another Protocol State, verify without undue or unreasonable delay whether a smuggled migrant is a national or has the right of permanent residence in Malta;

(c) At the request of the appropriate authority or representative of another Protocol State, facilitate the issue of documents or other authorization as necessary to enable a smuggled migrant who is either a national of Malta or who has a right of permanent residence in Malta, to travel and re-enter Malta.

### **Article 31 – Extradition**

(1) Where the return of migrants is not conducted under Article 27 of this Act the rules in the Extradition Act, Chapter 276 of the Laws of Malta shall apply.

## **Article 32 – Other international obligations**

- (1) The return of migrants under this Act shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of smuggled migrants.
- (2) Nothing in this Act shall affect the other rights, obligations and responsibilities of Malta and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

## **Miscellaneous**

### **Article 33 - Training and prevention**

The coordinating committee shall:

- (a) Develop and disseminate to professionals, including immigration and criminal justice officers, who are likely to encounter smuggled migrants, information, materials and training to assist them to prevent and combat the smuggling of migrants, while protecting and preserving the rights of smuggled migrants;
- (b) Develop and disseminate public information programmes to increase public awareness of the fact that smuggling of migrants is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses a serious threat to smuggled migrants;
- (c) Promote and strengthen development programmes and cooperation at the national level, taking into account the socio-economic realities of migration and paying special

attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

#### **Article 34 - Information**

Relevant information shall be exchanged between Malta and other Protocol States in accordance with the purposes this Act including:

- (a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in the smuggling of migrants;
- (b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in this Act;
- (c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;
- (d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents and ways of detecting them;
- (e) Legislative experiences and practices and measures to prevent and combat the smuggling of migrants; and
- (f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in this Act.

